SANJIV

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2039 OF 2006

Shri Vijju Manikam Swami @ Tambi,
R/o, Santoshi Mata Nagar No.2, Road
No.5, Room No. 1, JVPD Scheme,
Vile Parle (West), Mumbai – 400 056. ....Petitioner

Vs.

1 Shri Amitab Gupta,
Deputy Commissioner of Police,
Zone IX, Mumbai.

2 Assistant Commissioner of Police,
Santacruz Division,
Mumbai.

3 The State of Maharashtra. ....
Respondents

Mr. U. N. Tripathi for petitioner.

Ms. M. H. Mhatre, APP for the State.

CORAM : SMT. RANJANA DESAI, J.

DATE : 23TH NOVEMBER, 2006.

ORAL JUDGMENT :-

1. In this petition the petitioner has challenged the order of externment dated 29/05/2006 issued by respondent 1, Deputy Commissioner of Police, Zone-IX of Mumbai, externing the petitioner from the limits of Brihan Bombay, New Bombay, Thane and Raigad districts for a period of six months under Section 56(1) (a)(b) of the Bombay Police Act 1951 (for short "The said Act") and also the order dated 29/08/2006 passed by the State Government in the appeal under Section 60 of the said Act preferred by the petitioner being aggrieved by the externment order dated 29/05/2006.

2. The order of externment dated 29/05/2006 is issued by respondent 1 on the basis of one case which is registered at Juhu Police Station being C. R. No. 411 of 2005 under Sections 323, 324, 504 r/w 34 of the Indian Penal Code and two in-camera statements, one dated 27/02/2006 and another dated 28/02/2006. On the basis of this material, respondent 1 has came to the conclusion that the activities of the petitioner are causing and/or calculated to cause alarm, danger or harm to the shop-keepers, residents and hawkers of the localities and areas known as Santoshimata Nagar, Indira Nagar, Neharu Nagar, Gulmohar Road, Vile-parle and areas adjoining

thereto in the jurisdiction of Juhu Police Station in Mumbai.

3. Mr. Tripathi, the learned counsel for the petitioner has assailed the impugned orders on several grounds. However, only one submission appears to be of some substance. He submitted that while disposing of the appeal, the appellate authority no doubt reduced the area of externment to Bombay and Thane but the appellate authority has committed a grave error. The appellate authority has referred to C. R. No. 904 of 2006 which was registered on 08/04/2006. Mr. Tripathi submitted that this offence was not included in the show-cause notice and therefore, respondent 1 has not even referred to it in his order. It was never the subject matter of proceedings hence no reliance was placed on it. However, surprisingly, the appellate authority included this incident in its order. Mr. Tripathi urged that hence the externment order must be set aside. In support of his submission Mr. Tripathi relied on the judgment of this Court in ***Amin Hamid Inamdar Vs. R. D. Shinde, Dy. Commissioner, Mumbai delivered on 14/10/2004 in Criminal Writ Petition No. 1728 of 2004 (Smt. Tahilramani, J.)*** and judgment of the ***Nagpur Bench of this Court in Shailandra Singh @ Litil Sardar Vs. State of***

Maharashtra, 2001(4) Mh. L. J. 54..

4. As against this, learned APP contended that the order of externment cannot be set aside on account of mistake committed by the appellate authority. She submitted that the doctrine of merger is not available in Criminal Jurisprudence. Therefore, proper course is to set aside the said order and remand the matter to the appellate authority. She has taken me through the affidavit in support of the externment order.

5. I have applied my mind to the rival submissions. I find substance in the submission of the learned APP that on account of mistake committed by the appellate authority by including in its order a case not even mentioned in the show-cause notice, the impugned order passed by respondent 1 cannot be set aside. The impugned order could be set aside because of any glaring defects in it or on account of non-application of mind of respondent 1, i. e. the externing authority. If the mistake is committed by the appellate authority, the order should be set aside and the matter should be remanded to the appellate authority for fresh consideration. However, in the facts of this case, I feel that such a course would result in great hardship to

the petitioner. The order of externment is dated 29/05/2006. The petitioner was externed for 6 months. The period of externment expires on 29/11/2006. The appellate authority's order is dated 29/08/2006. If the matter is remanded to the appellate authority now, by the time the appellate authority hears it, the externment period would get over. In this connection, I may refer to judgment in ***Shailendra Singh's case (supra)***. In that case the appellate authority had failed to provide proper and sufficient opportunity of hearing to the petitioner. It was contended by the learned APP that the matter may be remanded to the appellate authority for proper hearing. This court repelled this contention by holding that the appeal was decided on 24/07/2000 and the order of remand at that stage, would be nothing but abuse of process of law. I am of the opinion that even in this case remanding the matter to the appellate authority at this stage would be abuse of process of law. In the peculiar facts and circumstances of the case, therefore, the impugned order passed by the appellate authority as well as the impugned order of externment deserve to be quashed and set aside. Hence I pass the following order.

6. Impugned order dated 29/05/2006 passed by Deputy Commissioner of Police, Zone IX, Mumbai and the appellate order dated 29/08/2006 passed by the State Government are quashed and set aside. Petition is disposed of in aforestated terms.

(SMT. RANJANA DESAI, J)